Supreme Court, U.S.
FILED

No. _____ 99 254 AUG 12 1999

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

ELWOOD STROUT, DEBORAH STROUT, JOHN EULITT, BELINDA EULITT, RICHARD ROY, AND PATRICIA ROY,
Petitioners,

v.

J. DUKE ALBANESE, in his official capacity as Commissioner of the State of Maine Department of Education,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

VINCENT P. MCCARTHY
ANN-LOUISE LOHR
AMERICAN CENTER FOR LAW AND JUSTICE, NORTHEAST, INC.
8 South Main Street
P.O. Box 1629
New Milford, CT 06776
(860) 355-1902

JAY ALAN SEKULOW
Counsel of Record
WALTER M. WEBER
AMERICAN CENTER FOR LAW AND JUSTICE, INC.
1000 Thos. Jefferson St., N.W.
Suite 609
Washington, D.C. 20007
(202) 337-2273

STEPHEN C. WHITING
AMERICAN CENTER FOR LAW AND JUSTICE, MAINE
75 Pearl Street
Suite 213
Portland, Maine 04101
(207) 780-0681

Attorneys for Petitioners

QUESTIONS PRESENTED

The State of Maine provides by statute that those parents who live in a school district *without* a public high school may send their children to the private school of their choice and that the State will pay the tuition for those children at that private school up to the statutory legal tuition rate. Maine *excludes* private *religious* schools from the program, however, by statute. *See* 20-A M.R.S.A. § 2951(2). The First Circuit, in rejecting parents' challenge to that statutory exclusion, held that the Establishment Clause *requires* the discriminatory exclusion of otherwise eligible private religious schools. The questions presented are:

1. Whether the Establishment Clause of the First Amendment requires the discriminatory exclusion of an otherwise eligible private school from a state tuitioning program just because that school is religious?

2. Whether 20-A M.R.S.A. § 2951(2) violates the Free Speech and Establishment Clauses of the First Amendment because, rather than treating religion neutrally, it excludes otherwise eligible private schools from its tuitioning program based solely on the religious viewpoint presented in those schools.

3. Whether 20-A M.R.S.A. § 2951(2) violates the Equal Protection Clause of the Fourteenth Amendment because the State's refusal to pay tuition for otherwise eligible private sectarian education discriminates against parents on the basis of religion, religious beliefs, speech content and association.

4. Whether 20-A M.R.S.A. § 2951(2) violates the Free Exercise Clause of the First Amendment because it

excludes funding of otherwise eligible education solely on the basis of religion.

5. Whether 20-A M.R.S.A. § 2951(2) violates the Fourteenth Amendment and the Free Speech Clause of the First Amendment by preventing parents from using their tuition allotments to expose their children to the educational message which best reflects their morals and values.

PARTIES

All of the parties are listed in the caption on the cover. None of the parties is a corporation. *See* Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF AUTHORITIES vii

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 1

A. Statement of Material Facts 2
B. Statement on Preservation Below of Federal Questions 5

REASONS FOR GRANTING THE WRIT 6

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 7

A. The Decision Below Misapplies the Concepts of *Direct* vs. *Indirect* Funding and Thus Conflicts with this Court's Decisions. 7

B. The Decision Below Conflicts with this Court's Numerous Decisions Protecting Religious Speech

and the Religious Viewpoint against Government Discrimination. 10

C. The Decision Below Fails to Consider, and Flatly Contradicts, this Court's Post-*Nyquist* Jurisprudence. 12

II. THE DECISION BELOW CONFLICTS WITH THE RECENT DECISIONS OF THE SUPREME COURTS OF OHIO, ARIZONA AND WISCONSIN 14

CONCLUSION 19

APPENDICES

A. Opinion, *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir. 1999) 1a

B. Opinion, *Strout* v. *Commissioner, Maine Department of Education*, 13 F. Supp. 2d 112 (Me.1998) 25a

C. 20-A M.R.S.A. § 2951 . . . . . 30a
20-A M.R.S.A. § 5204 (4) 32a

TABLE OF AUTHORITIES

Cases ***Page***

Agostini v. Felton, 521 U.S. 203 (1997) ... 8, 10-12, 15, 16

Bagley v. Raymond School Dept., 728 A.2d 127 (Me. 1999), *petition for certiorari filed,* - U.S.L.W. - (Jul 22, 1999) (No. 99-163) 2

Board of Educ. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226 (1990) 10-12

Chittenden Town School Dist. v. Vermont Dept. of Educ., - A.2d - , 1999WL 378244 (Vt., June 11, 1999) 2

Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir.), *cert. denied,* 119 S. Ct. 2357 (1999) 9

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 13

Everson v. Board of Education, 330 U.S. 1 (1947) 14

Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602, *cert. denied,* 119 S. Ct. 466 (1998) 14, 15

Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606 (1999), *petition for certiorari filed,* 67 U.S.L.W. 3671 (Apr. 26, 1999) (Nos. 98-1716, 1718) 17, 18

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) 14, 15, 17

Mueller v. Allen, 463 U.S. 602 (1983) 9, 10, 17, 18

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) 16

Rosenberger v. Rector of the Univ. of Virginia, 515 U.S. 819 (1995) 10-13

Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999) 15

Strout v. Commissioner, Maine Dept. of Educ., 13 F. Supp. 2d 112 (D.Me. 1998) 1

Strout v. *Albanese*, 178 F.3d 57 (1st Cir. 1999) 1, 7, 12

Widmar v. Vincent, 454 U.S. 263 (1981) 9, 11, 12

Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) 8, 10, 15

Zobrest v. Catalina Hills School District, 509 U.S. 1 (1993) 9, 10

Constitutional and Statutory Provisions

U.S. Const. amend. I 1

U.S. Const. amend. XIV, § 1 1

28 U.S.C. § 1257 1

20-A M.R.S.A. § 1001(8) 2

20-A M.R.S.A. § 2901 3

20-A M.R.S.A. § 2951 ..... 1, 4

20-A M.R.S.A. § 2951(2) 2, 3

20-A M.R.S.A. § 5204(4) 3

20-A M.R.S.A. § 5304(4) 1

20-A M.R.S.A. § 5606 3

Other Authorities

Viteritti, *Joseph P. Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law,* 21 Harv. J.L. & Pub. Pol'y 657 (1998). 10

DECISIONS BELOW

The decision of the United States District Court for the District of Maine is reported at 13 F. Supp. 2d 112 (D. Me.1998). The decision for the United States Court of Appeals for the First Circuit is reported at 178 F.3d 57 (1st Cir. 1999).

JURISDICTION

The United States Court of Appeals for the First Circuit issued its decision affirming the judgment of the United States District Court on May 27, 1999. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional provisions are involved in this case: U.S. Const. amends. I and XIV § 1. The Maine state statutory provision (set forth in the Appendix to the Petition) is: 20-A M.R.S.A. § 2951(2).

STATEMENT OF THE CASE

Petitioners are three sets of parents who reside in Minot, Maine who have challenged the constitutionality of a state statute, 20-A M.R.S.A. § 2951(2), which precludes parents who send their children to sectarian schools from participating in the State's private school tuitioning program. By statute, towns which do not operate secondary schools must pay up to the legal tuition rate to the public or private high schools selected by parents for their children. 20-A M.R.S.A. §5304(4). Because the Town of Minot does not have a high school, Petitioners chose to send their daughters to St. Dominic Regional High School ("St. Dominic's"), a sectarian secondary school in nearby Lewiston, Maine. Because St. Dominic's is

a religious school and therefore not a "non-sectarian" school as specified by the statute, the State of Maine has denied Petitioners the right to participate in the tuitioning program.[1]

Petitioners do not contend that the State of Maine has an affirmative obligation to fund private education – sectarian or nonsectarian. They do argue, however, that once Maine decides to fund private education, as it does here, it must fund sectarian and nonsectarian education equally and in a manner which is not hostile towards religion.

A. Statement of Material Facts

Petitioners are three sets of parents who live in a school district in Maine which does not have a public high school. Petitioners have challenged the constitutionality of a state statute, 20-A M.R.S.A. § 2951(2), which precludes parents who send their children to sectarian schools from participating in the State's tuitioning program. By statute, all school boards in Maine must provide education for residents through the twelfth grade. 20-A M.R.S.A. § 1001(8). The Town of Minot, by the Minot School Committee, does not operate a secondary school.

---

[1]A challenge to 20-A M.R.S.A. § 2951(2), was also brought in Maine state court. *Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me. 1999), *petition for certiorari filed*, – U.S.L.W. – (Jul. 22, 1999) (No. 99-163). The Maine Supreme Court's opinion paralleled the First Circuit's opinion in *Strout*, holding that the discrimination against religion and the religious viewpoint is required by the Establishment Clause.

In addition, in a recent decision, the Vermont Supreme Court held that pursuant to a very specific provision in the Vermont Constitution, no public funds could be used to finance sectarian education. *Chittenden Town School Dist. v. Vermont Dept. of Educ.*, – A.2d – , 1999 WL 378244 (Vt., June 11, 1999). The court, however, concluded that under this Court's Establishment Clause jurisprudence, it might reach a contrary result.

In order to fulfill its obligation under § 1001(8), the Committee pays tuition for high school aged residents to attend "a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country" pursuant to 20-A M.R.S.A. § 5204(4). Pursuant to § 5204(4), the Committee is obligated to pay up to the legal tuition rate, established by 20-A M.R.S.A. § 5606, to the school which the parents select. Parents are responsible to pay that portion which exceeds the established rate. For the 1996-97 school year, the established rate was $4,900.00.

At the core of this petition is 20-A M.R.S.A. § 2951(2), which states in pertinent part that "a private secondary school may be approved for the receipt of public funds for tuition purposes only if . . . [i]t is a nonsectarian school in accordance with the First Amendment of the United States Constitution." The only other requirements of the statute are that the school meet the basic approval of § 2901, namely that the school be incorporated, comply with the reporting and auditing requirements, and participate in Maine's academic assessment program.

St. Dominic Regional High School (St. Dominic's) is a private, sectarian Catholic school located in Lewiston, Maine. Tuition for St. Dominic's for the 1996-97 school year was approximately $3,850.00. St. Dominic's is approved by the State of Maine Department of Education pursuant to 20-A M.R.S.A. § 2901 and is incorporated under the laws of the State of Maine. St. Dominic's exceeds the curriculum requirements mandated by law. In short, St. Dominic's qualified as an eligible school under Maine's tuitioning program in all respects but one: because it is not "non-sectarian" as required by § 2951(2), it is not "approved for

tuition purposes" thereunder. Accordingly, parents who send their children to St. Dominic's are ineligible to receive tuition reimbursement under the tuitioning scheme.

Petitioners Elwood Strout and Deborah Strout requested reimbursement from School Union 29 to pay tuition for their daughter, Shea, to attend St. Dominic's for the 1996-97 school year. School Union 29, by its Superintendent Robert E. Wall, denied their request, by letter dated October 10, 1996, stating, "[t]he law is clear that we are unable to pay tuition for St. Dom's," referencing a letter from the Department of Education Deputy Commissioner Poulin which stated that to do so would be "unconstitutional and illegal." *Plaintiffs' Amended Complaint, Exhibit 1.* The Strouts additionally sought reimbursement from the Department of Education by letter dated July 15, 1996. The Department of Education, by its Commissioner, Defendant-Appellee J. Duke Albanese, by letter dated August 20, 1996, denied their request. *Plaintiffs' Amended Complaint, Exhibit 2.* Again, on September 23, 1996, the Strouts wrote to the Department of Education and Defendant-Appellee Albanese, seeking reimbursement, and again, by letter dated November 22, 1996, their request was denied. *Plaintiffs' Amended Complaint, Exhibit 3.* The letter cited 20-A M.R.S.A. § 2951 as the basis for the denial of the request. Likewise, the Strouts' request for tuition reimbursement for their daughter to attend St. Dominic's for the 1997-98 year was denied.

Petitioners John and Belinda Eulitt were orally informed by Superintendent Wall that tuition for their daughter, Alena, to attend St. Dominic's for the 1996-97 school year would not be reimbursed. In light of this and with knowledge of the Strouts' experience, they believed that a formal request would be futile.

Similarly, Petitioners Richard and Patricia Roy attended an open parents meeting in the Fall of 1997 at which time they were informed that tuition would not be reimbursed if they chose to send their daughter, Jennifer, to St. Dominic's for the 1997-98 school year, due to the religious nature of the school.

If the Petitioners' children attended an approved public or private *non-sectarian* school, outside the State of Maine or even outside the United States, the State of Maine would subsidize their education. But Maine singles out for discriminatory exclusion from its program those parents who choose to send their children to private *religious* school. This discriminatory practice manifests Maine's hostility toward the religion. Petitioners seek to end this discrimination and to obtain funding on an equal basis with other Maine parents who send their children to non-sectarian private schools.

B. Statement on Preservation Below of Federal Questions

The federal questions presented by the Petitioners have been the central focus of this dispute between the parties and the principal grounds of the decisions below. Both the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit rejected Petitioners' arguments that Maine's discrimination against the religious viewpoint in public school violates: (1) the Establishment Clause of the First Amendment; (2) the Equal Protection Clause of the Fourteenth Amendment; (3) the Free Exercise Clause of the First Amendment; (4) the Due Process Clause of the Fourteenth Amendment; and (5) the Free Speech Clause of the First Amendment. Both lower courts held that the Establishment Clause of the First Amendment *required* Maine's discrimination against religion.

REASONS FOR GRANTING THE WRIT

The central issue in this case is one of great importance: whether the Establishment Clause of the First Amendment *requires* discrimination against the religious point of view in the provision of tuition assistance to parents of children attending private schools. This Court's Establishment Clause jurisprudence and the highest courts of three states have concluded that the Establishment Clause is not offended by a neutral program of state assistance which allows parents to decide where the aid will be spent. In such a program there can be no argument that the state is endorsing religion or one religion over another. The First Circuit, by contrast, reached a decision in square conflict with these other cases.

The Petitioners are parents of Maine children who seek review by this Court of the First Circuit's decision which confused *indirect aid* (based on parental choice as to where to money will be spent) with *direct aid* (based on a state's choice as to where money will be spent) and thereby upheld, as supposedly constitutionally required, a statutory program of discrimination against religious viewpoint. The decision below directly conflicts with the decisions by this Court forbidding such discrimination, particularly when, as here, the discrimination is justified by misplaced fear of an Establishment Clause violation.

This Petition presents a direct conflict between the First Circuit and three state supreme courts. The Petition also presents an important and substantial issues which necessitate review. This Court's should grant review.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The decision below directly contradicts this Court's precedents involving the Establishment Clause in three respects. First, the court below misinterpreted this Court's directives regarding *direct* and *indirect* funding of religious education. Second, the decision below conflicts with this Court's numerous decisions protecting religious speech and the religious viewpoint from discrimination by the State. Third, the decision below fails to consider, and therefore contradicts, this Courts's post-*Nyquist* jurisprudence.

A. The Decision Below Misapplies the Concepts of *Direct* vs. *Indirect* Funding and Thus Conflicts With This Court's Decisions.

The First Circuit's opinion held that any Free Speech, Equal Protection or Free Exercise rights of the Petitioners which are violated by Maine's discriminatory funding of private education are trumped by the compelling state interest of the State of Maine to uphold the Establishment Clause of the United States Constitution. *Strout* v. *Albanese*, 178 F.3d 57, 64 n.12 (1st Cir. 1999). The court based its ruling upon the premise that this Court's decisions purportedly categorically forbid, under the Establishment Clause, any program in which funds are *directly provided* to sectarian institutions. The First Circuit misinterpreted *directly provided* to include any aid paid by the State to the sectarian institution, regardless of how and by whom the determination is made to direct the aid. According to the First Circuit, it makes no difference that the funds are paid to the sectarian school *at the direction of the parent* rather than *at the direction of the State*. The fact that the

private choices of parents has directed the State to pay the institution is of no consequence to the court below.

This Court, however, in *Agostini v. Felton,* 521 U.S. 203, 225 (1997), specifically rejected the notion "that all government aid that directly aids the educational function of religious schools is invalid." To the contrary, this Court has held that financial aid appropriated by the State can be constitutional if (1) it is neutral on its face regarding religion and (2) any aid to religious schools results from the private decisions of individuals. *Witters* v. *Washington Dept. of Services for the Blind,* 474 U.S. 481, 490-92 (1986) (Powell, J., concurring). In *Witters,* this Court held that the Establishment Clause did not constitute a bar to the issuance of vocational tuition to a blind person who wished to use the grant to attend a Christian college and obtain a religious education. The program was held valid because the money was made available *neutrally,* that is, without regard to whether it was going to be used for a sectarian or nonsectarian, public or non-public institution. In *Agostini,* the Court noted that it made no difference whether tuition money went to religious institutions, so long as that outcome came about "only as a result of the genuinely independent and private choices of individuals." *Agostini,* 521 U.S. at 226 (internal quotation omitted).

Contrary to the First Circuit's opinion, aid is not designated *direct* or *indirect* based on where the aid ends up but rather on who makes the decision as to where the aid is to be spent. If the parents make the choice then the aid to the sectarian institution is *indirect* and not *direct.* The First Circuit's opinion below, therefore, rests on a fundamental misunderstanding of this Court's distinction between *direct* (government-directed) and *indirect* (parent-directed) aid. Petitioners here are making the choice and not the State of

Maine; state dollars go to St. Dominic's at the direction of the parents and not at the direction of the State of Maine. The funding is, thus, *indirect*.[2]

The Establishment Clause forbids the endorsement of religion by the State, not by private actors. Hence, this Court has emphasized the importance of personal private choice in this area of the law. In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court disposed of the argument that all state aid which ends up in sectarian schools violates the Establishment Clause by noting that while state aid given to parents for use at a sectarian school has the same economic effect as state funds given directly to the sectarian institution, the parents' choice renders the aid indirect and, thus, constitutionally acceptable. As this Court stated in *Mueller*:

> Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" . . . can be deemed to have been conferred on any particular religion, or on religion generally.

Id. at 399 (quoting *Widmar v. Vincent,* 545 U.S. 263, 274 (1981)).

Similarly, in *Zobrest v. Catalina Hills School District,* 509 U.S. 1 (1993), this Court upheld the provision of a language interpreter for a deaf student in a sectarian school. The Court

---

[2]In *Columbia Union College v. Clark,* 159 F.3d 151, 159 (4th Cir. 1998), *cert. denied,* 119 S. Ct. 2357 (1999), the Fourth Circuit identified the constitutional fault with an aid program as arising where "[t]he state aid at issue . . . reaches a religious school solely as a result of a decision 'made by the state' not the student." (Citing *Witters*, 474 U.S. at 488.)

upheld the *Zobrest* program because the payment for the interpreter was the result of the private decisions of individual parents. Moreover, because the program created "no financial incentive for parents to choose a sectarian school, an interpreter's presence there '[could] not be attributed to state decision making.' " *Id.* at 10.

B. The Decision Below Conflicts with this Court's Numerous Decisions Protecting Religious Speech and the Religious Viewpoint against Government Discrimination.

In a recent line of cases, this Court has expanded and clarified the protection for the rights of religious speech and the religious viewpoint. *Mueller* v. *Allen*, 463 U.S. 388 (1983) (state income tax deduction for educational expenses including those incurred at sectarian schools); *Witters* v. *Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986) (state financial assistance to blind student attending private Christian college); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U. S. 1 (1993) (sign-language interpreter provided for deaf student in sectarian high school); *Rosenberger* v. *Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (state university funds used to pay printing costs of student newspaper espousing religious viewpoint); *Agostini* v. *Felton*, 521 U.S. 203 (1997) (public school teachers proving remedial education to disadvantaged children in parochial schools). *See also* Viteritti, *Joseph P. Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657, 709-716 (1998).

Also, in its public forum analysis this Court has broken down the wall of "segregation" of religion and religious speech. *Board of Educ. of Westside Comm. Schools (Dist. 66) v.*

Mergens, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In each of these cases, this Court rejected a proffered Establishment Clause excuse for discriminating against religion or the religious viewpoint.

In *Agostini* the Court relied *inter alia* on its decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), a public forum case which required a state university facility to be open equally to religious and non-religious groups. By referencing *Widmar*, the *Agostini* Court applied equal access analysis to the issue of public aid to sectarian schools, holding that the neutrality of an aid program is "an important index of secular effect." *Agostini*, 521 U.S. at 231 (citing *Widmar*, 454 U.S. at 274). The aid program at issue in *Agostini* was upheld because it did not "give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services." *Id.* at 232.

In *Widmar* this Court forbade, as a violation of the First Amendment, discrimination against religious speech at a public university. The Court ruled that religious speech was entitled to no less protection than other kinds of speech and that once a forum was opened to expression, the Establishment Clause provided no defense for discrimination against religious speech. *Widmar* was followed by *Mergens* and then *Rosenberger*, in which the Court again held that the Establishment Clause provided no defense to a public university seeking to discriminate against a publication with a religious point of view. Much like the State of Maine, the University of Virginia in *Rosenberger* and University of Missouri at Kansas City in *Widmar* defended their exclusion of religious groups from participation in otherwise available

university programs, simply because a religious group has a religious point of view. This Court held that fear of an Establishment Clause violation does not justify discrimination against a religious point of view. It is important to note that the First Circuit in the case *sub judice* conceded that the constitutional rights of Petitioners have been violated but nevertheless held that the violation of these rights was justified – indeed required – under the Establishment Clause. *Strout*, 178 F.3d at 64 n.12.

The *Widmar/Mergens/Rosenberger/Agostini* line of cases dispelled the too-common assumption that religion and those asserting a religious point of view could and should be discriminatorily excluded from government and educational assistance programs. As this Court re-stated in *Mergens* "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (quoting *McDaniel v. Paty,* 435 U.S. 618, 641 (1978)) (Brennan, J., concurring in judgment).

C. The Decision Below Fails to Consider, and Flatly Contradicts, this Court's Post-*Nyquist* Jurisprudence.

In *Agostini*, the Supreme Court discussed the development of Establishment Clause jurisprudence and the faulty assumption upon which this anti-religious discrimination had rested, concluding that: "[o]ur more recent cases have undermined the assumptions upon which [past decisions] relied." 521 U.S. at 222. Morever, "[w]e therefore conclude that our Establishment Clause law has 'significant[ly]

chang[ed]' since we decided [those cases]." *Id.* at 237 (citation omitted).

The First Circuit's decision in *Strout* is inconsistent with this Court's more recent Establishment Clause jurisprudence, relying as it does on *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973), and other decisions predicated upon an incomplete, inaccurate, and outdated Establishment Clause jurisprudence. The First Circuit held that the Establishment Clause requires discrimination in funding between private sectarian and private non-sectarian schools. This holding contradicts the Supreme Court's holdings in *Agostini*, *Mergens, Zobrest*, *Witters*, and *Mueller*. The denial of Petitioners' constitutional rights cannot be justified by a fear of Establishment Clause violation because this Court's decisions make it clear that there is no Establishment Clause violation when a program treats all students the same whether they attend sectarian or non-sectarian private schools and when the expenditure of public funds is made on the basis of parental choices rather than state choices.

Commenting on the development in Establishment Clause jurisprudence, this Court, in *Rosenberger* v. *Rector of the University of Virginia,* 515 U.S. 819 (1995), noted the importance of neutrality: "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839.

II. THE DECISION BELOW CONFLICTS WITH THE RECENT DECISIONS OF THE SUPREME COURTS OF OHIO, ARIZONA AND WISCONSIN.

The Wisconsin, Arizona and Ohio Supreme Courts have held that State educational funding which ends up in sectarian institutions does not in and of itself create an Establishment Clause violation. These courts ruled that the Establishment Clause was not violated so long as the benefit to the sectarian institution was the result of a genuinely neutral program which preserved independent parental choice as to how the money is to be spent. These courts held that when the programs are neutral there can be no perceived endorsement of religion by the state. Each noted that parental choice ensures that parents, and not the state, will be making the decisions how the money will be spent. These cases also deny the applicability of *Nyquist* in light of the more recent developments in Supreme Court Establishment Clause jurisprudence.

The Wisconsin Supreme Court in *Jackson* v. *Benson*, 218 Wis. 2d 835, 578 N.W.2d 602, (1998), *cert. denied,* 119 S. Ct. 466 (1998), applied this Court's *Lemon* analysis, *see Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), to an Establishment Clause challenge to the Milwaukee Voucher Program. The voucher program provided private school assistance to low income students seeking to attend sectarian or non-sectarian schools. The court found that the program did not violate the Establishment Clause because it was neutral and provided for parental choice. Citing this Court's decision in *Everson v. Board of Education,* 330 U.S. 1 (1947), the Wisconsin Supreme Court found that the benefits of the Milwaukee Program extended to all citizens without regard to their religious beliefs and that the aid to the sectarian schools was indirect because it flowed to the sectarian institutions "only as

a result of genuinely independent and private choices of aid recipients." *Jackson,* 578 N.W.2d at 618 (citing *Witters*, 474 U.S. at 487). The *Jackson* court held that the Supreme Court Establishment Clause jurisprudence culminating in *Agostini*

> established the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and non-sectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school age children.

Jackson, 578 N.W.2d at 617. The conflict between this decision and the First Circuit's understanding of this Court's Establishment Clause jurisprudence could not be more direct.

Likewise, in *Simmons-Harris* v. *Goff,* 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999), the Ohio Supreme Court upheld an Ohio voucher program in the face of an Establishment Clause challenge.[3] Applying the *Lemon* test, the Court found that the program had a secular legislative purpose, that its primary effect neither advanced nor inhibited religion, and that it did not excessively entangle government with religion.

The *Goff* court ruled that the fact that beneficiaries of the School Voucher Plan attended sectarian schools did not render the program unconstitutional if the scholarships were "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and [are] made available to both religious and

---

[3]The statute was, however, struck down by the court for violating the Uniformity Clause of Section 26 Article II of the Ohio Constitution.

secular beneficiaries on a nondiscriminatory basis." 711 N.E.2d at 210 (citing *Agostini*, 521 U.S. at 231). Relying on this Court's decisions in *Zobrest*, *Witters*, and *Mueller*, the *Goff* court held that whatever link between government and religion is created by the School Voucher Program

> is indirect, depending only on the 'genuinely independent and private choices' of individual parents who act for themselves and their children, not for the government.

711 N.E.2d at 209 (citing *Witters*, 474 U.S. at 487).

The decision in *Goff* demonstrated the irrelevance of the hyper-technical arguments over the literal payee on the education aid check. As *Goff* notes, where the program is neutral and the choices are made by students and parents, the real beneficiaries of this program are students.[4]

The Supreme Court has viewed benefits flowing to sectarian schools from genuinely neutral programs, based upon choices made by parents, constitute permissible *indirect* assistance to sectarian schools. *See* Section I. So, from a constitutional viewpoint, the only real Establishment Clause issue is: who is making the choice to spend the money on a particular school. The issue is not whether the sectarian school receives a benefit. The fact that a sectarian school benefits from a private parental choice to send a student there is beside the point. Also beside

---

[4]The Eighth Circuit Court of Appeals held that a school district was prohibited from denying special education services to a student merely because the student attended a religious school. *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

the point is the hyper-technical detail whether the government check is made payable to the parent and endorsed over to the private school, or made payable to the private school because of the parent's choice of that particular school. The key issue is whether *parental* choice or a *governmental* choice determines where any benefit goes. Indeed, if the Establishment Clause forbade any public program which offers assistance to sectarian schools, then other government programs which provide assistance to students attending sectarian schools, such as the GI bill, would have already been ruled unconstitutional.

Finally, the Arizona Supreme Court, in *Kotterman* v. *Killian,* 193 Ariz. 273, 972 P.2d 606 (1999), *petition for cert. filed,* 67 U.S.L.W. 3671 (Apr. 26, 1999) (Nos. 98-1716, 1718), also embraced the principle of neutrality, relying on *Agostini, Rosenberger, Zobrest, Witters* and *Mueller.* The challenged Arizona program allowed a state tax credit of up to $500.00 for those who donate to school tuition organizations which grant tuition to sectarian and non-sectarian schools. The *Kotterman* court upheld the program in the face of an Establishment Clause challenge. The court analyzed this program under the three prong test in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), and found that the program satisfied the *Lemon* test. The court found that the program had a secular purpose, citing the Supreme Court's language in *Mueller*:

> A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and the state's efforts to

> assist parents in meeting the rising costs of educational expenses plainly serves the secular purpose of ensuring that the state's citizenry is well-educated.

Kotterman, 972 P.2d at 611 (citing *Mueller*, 463 U.S. at 395).

Kotterman distinguished *Nyquist,* as this Court did in *Mueller*, by describing the tuition assistance program there as "thinly disguised 'tax benefits,'" actually amounting to tuition grants, to the parents of the children attending private schools." *Id.* at 612 (citing *Mueller,* 463 U.S. at 394). Importantly, Petitioners in this case are not arguing that the state of Maine has an obligation to fund private education equally with public education, so *Nyquist* is inapposite. Petitioners here argue, however, that once a state begins to fund private education it must do so equally among all points of view.

Like the Ohio Supreme Court in the *Goff* case and the Wisconsin Supreme Court in *Jackson*, the Arizona Supreme Court in *Kotterman* emphasized the means by which the private funds reach sectarian schools and the importance of "numerous, private choices" in contrast to direct state financial aid. *See Mueller,* 463 U.S. 388, 399 (1983). The Arizona court correctly understood the distinction between direct and indirect assistance: "[w]here assistance to religious institutions is indirect and attenuated, *i.e., private individuals choose where the funds will go,* the Justices have generally been reluctant to find a constitutional impediment." *Kotterman,* 972 P.2d at 613.

The First Circuit, in square conflict with *Jackson, Goff,* and *Kotterman,* disregarded the key feature of parental choice and instead held it would be unconstitutional to have a neutral

assistance program simply because the aid was made literally payable to the school the parents selected. The First Circuit erroneously tied its decision to an excessively formal view of direct versus indirect benefits, a view this Court has long since rejected.

Conclusion

For all of the above reasons, this Court should grant *certiorari*.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
WALTER M. WEBER
THE AMERICAN CENTER FOR
LAW AND JUSTICE, INC.
1000 Thomas Jefferson St., NW
Suite 609
Washington, DC 20007
(202) 337-2273

VINCENT P. MCCARTHY
ANN-LOUISE LOHR
AMERICAN CENTER FOR LAW
AND JUSTICE, NORTHEAST, INC.
8 South Main Street
P.O. Box 1629
New Milford, CT 06776
(860) 355-1902

STEPHEN C. WHITING
AMERICAN CENTER FOR LAW
AND JUSTICE, MAINE
75 Pearl Street
Suite 213
Portland, Maine 04101
(207) 780-0681

Attorneys for Petitioners

APPENDIX

APPENDIX A

Elwood STROUT, et al., Plaintiffs, Appellants,
v.
J. Duke ALBANESE, In His Official Capacity as Commissioner, Maine Department of Education, etc., et al., Defendants, Appellees.

No. 98-1986.

United States Court of Appeals,
First Circuit.

Heard Feb. 4, 1999, Decided May 27, 1999.

Affirmed.

Vincent P. McCarthy, with whom Ann-Louise Lohr, The American Center for Law and Justice, Northeast, Brian W. Raum, American Center for Law and Justice, New York, Stephen C. Whiting, The Whiting Law Firm, P.A., Jay A. Sekulow and American Center for Law and Justice, Inc. were on brief, for appellants.

Peter J. Brann, State Solicitor, with whom Andrew Ketterer, Attorney General, and Paul Stern, Deputy Attorney General, were on brief, for appellee Commissioner, Maine Department of Education.

A. Van C. Lanckton, Craig & MacCauley, PC and Marc D. Stern on brief for American Jewish Congress, amicus curiae.

Robert H. Chanin, John M. West, Alice O'Brien, Bredhoff

& Kaiser, P.L.L.C., Donald F. Fontaine, Fontaine & Beal, P.A., Steven K. Green, Ayesha N. Khan, Elliot M. Mincberg, Judith E. Schaeffer, Barbara G. Shaw, Marcus, Grygiel & Clegg, PA, Jeffrey A. Thaler, Bernstein, Shur, Sawyer & Nelson, Elizabeth J. Coleman, Steven M. Freeman, Lauren A. Levin and David Rosenberg on brief for Maine Education Association, National Education Association, Americans United for Separation of Church and State, People for the American Way Foundation, Maine Civil Liberties Union, and Anti-Defamation League of B'nai B'rith, amici curiae.

Before Torruella, Chief Judge, Campbell, Senior Circuit Judge, and Stahl, Circuit Judge.

TORRUELLA, Chief Judge.

As we embark upon resolution of the thorny questions presented by this appeal, it is appropriate that we keep in mind that "[c]onstitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics." Tilton v. Richardson, 403 U.S. 672, 678, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). The controversy before us patently reflects this truth.

The issues raised require us to consider the sometime competing values found in the Religion Clauses of the First Amendment of the Constitution [FN1]-- otherwise described as "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause." Id. at 677, 91 S.Ct. 2091. "[B]oth are cast in absolute terms, ... either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Commission, 397 U.S. 664, 668-69, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

FN1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I.

BACKGROUND

Maine has enacted a statute providing schooling for those students who live in communities that do not have public education facilities because of insufficient student density. [FN2] For these students, the state will pay grants directly to qualified private educational institutions to subsidize their schooling, provided the institutions are "non-sectarian" in nature. [FN3]

FN2. See Me.Rev.Stat. Ann. tit. 20, § 5204(4).

FN3. See Me.Rev.Stat. Ann. tit 20-A, § 2951(2).

Plaintiff-Appellants are the parents of students who are otherwise qualified to receive the benefits of this state-created subsidy, except that they have chosen to send their children to private sectarian schools. After Maine refused to fund their chosen sectarian institution, St. Dominic's Regional High School in Lewiston, Maine, the parents brought an action in the United States District Court for the District of Maine alleging numerous violations of their rights under: (1) the Establishment Clause; (2) the Equal Protection Clause; (3) the Free Exercise Clause; (4) the Due Process Clause of the Fourteenth Amendment; and (5) the Speech Clause of the First Amendment. [FN4]

FN4. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

> protection of the laws." U.S. Const. amend. XIV, § 1. The Establishment Clause, Free Exercise Clause, and the Free Speech Clause have been found to be applicable to the states through the Fourteenth Amendment. See Everson v. Board of Educ., 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (citing Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 108, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)).

The district court framed the issue before it as "whether Maine is constitutionally required to extend subsidies to sectarian schools." It viewed plaintiff-appellants' arguments "in terms of free exercise claims, establishment clause claims, equal protection claims and substantive due process claims," but found "it unnecessary to address [them] separately or to analyze the various tests that have been enumerated," because "[t]he same answer is obvious for all." Concluding that although plaintiff-appellants were free to send their children to sectarian schools, "they do not have a right to require taxpayers to subsidize that choice," the district court rejected their claims and granted summary judgment in favor of defendant-appellees. This appeal followed.

Below we address seriatim each of the bases on which the plaintiffs' claim an entitlement to relief.

DISCUSSION

I. Establishment Clause

First, plaintiff-appellants argue that the statute, § 2591(2), violates the Establishment Clause because, rather than treating religion neutrally, it demonstrates a hostility toward religion by excluding otherwise eligible sectarian schools from the tuition program based solely on the religious

viewpoint presented by these schools.

Although "this Nation's history has not been one of entirely sanitized separation between Church and State," Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1993), and while various forms of aid to religious institutions are permissible and have been approved by the somewhat inscrutable guidelines of the Supreme Court, [FN5] there is no binding authority for the proposition that the direct payment of tuition by the state to a private sectarian school is constitutionally permissible. See id. at 780, 93 S.Ct. 2955.

> FN5. See Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (upholding a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis, taught on the premises of sectarian schools by government employees, thus reversing in part, Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) and School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985)); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (holding that a state university program, whereby payment is made from mandatory student fees to outside contractors for the printing cost of a variety of student organizations, does not contravene the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (holding that providing a deaf student with a government-paid sign language interpreter who accompanies the student to classes in a sectarian school does not violate the Establishment

Clause); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (holding that the extension of aid to a blind student under a state vocational program by making direct payments to a student enrolled in a sectarian college does not violate the Establishment Clause); Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (holding that a state law allowing taxpayer-parents to deduct certain educational expenses in computing their state income tax does not violate the Establishment Clause even with regard to children attending sectarian schools); Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977) (holding that a state law: [1] authorizing the purchase and loan of secular text books to students in sectarian schools at their request or that of their parents; [2] supplying standardized test forms on secular subjects to sectarian schools that are thereafter scored by commercial services paid by the state; [3] providing speech, hearing, and psychological diagnostic services to students at sectarian schools at public expense by public employees; [4] authorizing the expenditure of public funds for therapeutic, guidance, and remedial services to students, including those in sectarian schools, the services to be provided at public locations, does not contravene the Establishment Clause, but provisions in that statute: [a] authorizing the expenditure of public funds for the purchase and loan to students or their parents of instructional material and equipment "incapable of diversion to religious use"--such as projectors, tape recorders, record players, maps and globes, science kits and weather forecasting charts--to be stored on sectarian school premises and

administered therein by publicly hired personnel; and [b] providing field trip transportation and services to non-public school students, are invalid with regard to sectarian schools); Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (holding that a federal statute which provides grants to colleges and universities for the construction of buildings and facilities used exclusively for secular educational purposes may be applied to sectarian institutions without violating the Establishment Clause, but allowing the Federal government 20-year oversight authority over the use of any facility constructed with such funds to ensure its nonsectarian use, violates the Religion Clauses); Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (holding that the lending by a state to parochial school students of non-sectarian textbooks available to all students is permissible under the Establishment Clause); Everson v. Board of Educ., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (holding that a state may reimburse the parents of parochial school students for the cost of their transportation to and from the schools provided it is part of a "general program" whereby busing of students includes nonsectarian school students). But see Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (holding that the creation of a school district which de facto is defined by common religious affiliation, and delegation of the state's discretionary authority over public schools to said group, is a violation of the Establishment Clause); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (holding that

certain public programs that provided services on sectarian school premises violated the Establishment Clause); Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) (holding that a state statute allowing the direct loan of: [1] instructional material, including periodicals, photographs, maps, charts, recordings, and films; and [2] equipment, including projectors, recorders, and laboratory paraphernalia, to sectarian schools violated the Establishment Clause); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (holding that direct payments by a state to sectarian schools pursuant to a statute providing grants for maintenance and repair of school facilities as well as certain income tax deductions for tuition expenses at sectarian schools violate the Establishment Clause); Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (holding that the reimbursement by a state to sectarian schools of the cost of teachers' salaries, textbooks, or other instructional materials violates the Establishment Clause).

A statement to the effect that "Congress shall make no law respecting the establishment of religion," U.S. Const. amend. I, is hardly equivocal language. The fact that it is the first of the several constitutional do's and don'ts contained in the Bill of Rights may not have been coincidental. Separation of church and state constituted a paramount principle and goal in the minds of some of the most influential of the Framers both by dint of historical experience, [FN6] and personal conviction. [FN7]

FN6. T. Curry, The First Freedoms 217 (1986)

(stating that at the time of the framing of the Bill of Rights: "The belief that government assistance to religion ... violated religious liberty had a long history.").

FN7. See Thomas Jefferson, A Bill for Establishing Religious Freedom, reprinted in 5 The Founder's Constitution 84 (P. Kurland & R. Lerner eds., 1987); James Madison, Memorial and Remonstrance Against Religious Assessments, cited in Everson, 330 U.S. at 63-72, 67 S.Ct. 504.

We highlight the proposition that in some cases in which state infringement on the free exercise of religion takes place, otherwise prohibited conduct may be permitted if the state establishes an overriding societal interest. Upholding the Establishment Clause, which is aimed at avoiding an entangled church and state, is such a paramount interest. In the long run, an entanglement of the two has been shown by history to be oppressive of religious freedom. See Nyquist, 413 U.S. at 760, 93 S.Ct. 2955; Engel v. Vitale, 370 U.S. 421, 431, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (such a union may tend "to destroy government and to degrade religion."); Everson, 330 U.S. at 12, 67 S.Ct. 504 ("cruel persecutions were the inevitable result of government established religions."). The present case, in which direct subsidies would be paid by the state to a sectarian primary and secondary school, is such an imbroglio.

In Nyquist, New York created a two-part program to help defray the costs of educating low-income children who chose to attend private religious schools. See 413 U.S. at 762-67, 93 S.Ct. 2955. The first part of the program provided for direct money grants from the State to "qualifying" nonpublic

schools to be used for the "maintenance and repair of ... school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." Id. at 762, 93 S.Ct. 2955. The second part involved tuition reimbursement grants which the state gave to low-income parents of private schoolchildren (including those who attended religious schools) as partial reimbursement for their children's tuition, and limited state income tax relief for parents who did not qualify for the tuition reimbursement. See id. at 764, 93 S.Ct. 2955. The Court concluded that all three programs were invalid under the Establishment Clause because they had the primary effect of advancing religion. See id. at 774-94, 93 S.Ct. 2955. With reference to the reimbursement portion of the law, the Court stated:

> There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repairs. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.

Id. at 780, 91 S.Ct. 2091 (emphasis added).

This dichotomy between direct and indirect aid is a recurring theme throughout Establishment Clause litigation. Although not all cases fit neatly within this formula, and this somewhat tenuous distinction has been the subject of considerable criticism by academia, [FN8] it is the closest thing that we have to a workable bright line rule, or that

perhaps is possible.

> FN8. Mark J. Beutler, Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications, 2 Geo. Mason Independent L.Rev. 7, 40-46 (1993); Al McConnell, Note, Abolishing Separate but (Un)Equal Status for Religious Universities, 77 Va. L.Rev. 1231, 1248 (1991); Evan T. Tagert, Comment, The Supreme Court, Effect Inquiry, and Aid to Parochial Education, 37 Stan. L.Rev. 219, 230-31 (1984).

Nevertheless, one thing is certain: the Supreme Court has never permitted broad sponsorship of religious schools. In those instances in which the Court has permitted funding to flow to religious schools, it has been in the context of a targeted grant, available to a limited population, for a specific purpose. See, e.g., Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (upholding a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis, taught on the premises of sectarian schools by government employees); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (holding that providing a deaf student with a government-paid sign language interpreter who accompanies the student to classes in a sectarian school does not violate the Establishment Clause). "The problem, like so many problems in constitutional law, is one of degree." Meek, 421 U.S. at 359, 95 S.Ct. 1753 (citation and internal quotation marks omitted). We find no authority in the Court's jurisprudence for now extending state support of sectarian schools from beyond the class of particular, limited situations described above. See supra note 5.

Moreover, reliance by plaintiff-appellants on the Supreme Court's decision in Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), is misplaced. In Rosenberger, the University of Virginia, a state instrumentality, authorized payment to outside contractors for the printing costs of a variety of publications issued by several student organizations. These payments, made from an activities fund generated by imposing mandatory student fees, were designed to support a broad range of extracurricular student activities related to the University's educational purpose. The University withheld authorization for payments to a printer with respect to one student organization's publication because it deemed it to be contrary to University guidelines prohibiting aid to religious organizations or activities. The student organization in question, as well as the publications for which printing costs were sought, promoted a "Christian" viewpoint. The University's denial of printing payments was successfully challenged by the student organization on the basis of viewpoint discrimination. See id. at 832-35, 115 S.Ct. 2510; see also Regan v. Taxation with Representation, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (holding that the state cannot discriminate based on the viewpoint of private persons whose speech it subsidizes).

In answering the University's concerns that such payments might run afoul of the First Amendment, the Court ruled that the funding did not contravene the Establishment Clause because it was "neutral towards religion." Id. at 840, 115 S.Ct. 2510. The neutrality of the program, the Court reasoned, distinguished it from a tax levied to directly support a church. [FN9] See id. There is a critical difference "between government speech [or action] endorsing religion, which the Establishment Clause forbids, and private speech

[or action] endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 843, 115 S.Ct. 2510 (emphasis in original, internal quotation marks omitted).

> FN9. "Our decision ... cannot be read as addressing an expenditure from a general tax fund...." Id. at 841, 115 S.Ct. 2510.

Most telling, from the perspective of the present case, is the majority's analysis of the issues presented by that appeal:

> The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions. The error is not in identifying the principle, but in believing that it controls this case ... [T]he Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity.... [T]he undisputed fact [is] that no public funds flow directly to [the student organization's] coffers.

Id. at 842, 115 S.Ct. 2510 (emphasis added, internal citations omitted).

In lauding neutrality as the keystone of Establishment Clause jurisprudence, plaintiff-appellants forget that neutrality is but one "hallmark of the Establishment Clause."

Rosenberger, 515 U.S. at 846, 115 S.Ct. 2510 (O'Connor, J., concurring). Rosenberger neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. See id. at 852, 115 S.Ct. 2510 (O'Connor, J., concurring).

The historic barrier that has existed between church and state throughout the life of the Republic has up to the present acted as an insurmountable impediment to the direct payments or subsidies by the state to sectarian institutions, particularly in the context of primary and secondary schools. See Tilton v. Richardson, 403 U.S. at 684-87, 91 S.Ct. 2091 (relying on the lessened danger of prohibited entanglement when college level institutions are involved); Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (upholding the creation of a public agency designed to assist in the placement of revenue bonds for the construction of buildings designed for secular use at higher education facilities including parochial colleges). Although the guidance provided by the Supreme Court has been less than crystalline, perhaps often by necessity due to the subject matter involved, approving direct payments of tuition by the state to sectarian schools represents a quantum leap that we are unwilling to take. Creating such a breach in the wall separating the State from secular establishments [FN10] is a task best left for the Supreme Court to undertake. [FN11]

> FN10. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." Everson, 330 U.S. at 18, 67 S.Ct. 504. Nevertheless, the Court upheld the reimbursement to parents from public funds for the cost of fares paid by them for public transportation by public carriers of

children attending public and Catholic schools. See id.

FN11. "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini, 521 U.S. at 238, 117 S.Ct. 1997 (citation and internal quotation marks omitted).

Finally, we are at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery. The Establishment Clause forbids the making of a law respecting the establishment of any religion. There is no relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies.

II. Equal Protection

Plaintiff-appellants argue that in addition to violating the Establishment Clause, Maine's alleged hostility towards religion violates their rights under the Equal Protection Clause of the Fourteenth Amendment. They claim that by virtue of the statute in question they are being discriminated against on the basis of religion, religious beliefs, speech content, and association.

Plaintiff-appellants' equal protection claims fail for many

of the same reasons that their Establishment Clause challenge founders. Writ simple, the state cannot be in the business of directly supporting religious schools. Plaintiff-appellants' equal protection claims fail, because, regardless of the appropriate level of scrutiny we employ, the state's compelling interest in avoiding an Establishment Clause violation requires that the statute exclude sectarian schools from the tuition program. [FN12]

> FN12. Unlike our concurring brother, we find it necessary to decide the Establishment Clause issue because we agree with the Maine Supreme Court that "If the State's justification [had been] based on an erroneous understanding of the Establishment Clause, its justification w[ould] not [have] withst[oo]d any level of scrutiny." Bagley v. Raymond School Dep't, 728 A.2d 127 (Me.1999).

Plaintiff-appellants allege on appeal that they "have been singled out simply because they desire their children to be educated in a Christian environment and from a biblical perspective, and for no other reason." Appellants' Br. at 23-24. Plaintiff-appellants desire that the state pay grants directly to sectarian schools, in this case St. Dominic's, to subsidize their children's schooling. Given the present state of jurisprudence, we can see no way in which this can be done without violating the Establishment Clause. See Nyquist, 413 U.S. at 780, 93 S.Ct. 2955. As a result, we find no Equal Protection Clause violation.

We are fortified in our conclusion by the Maine Supreme Court's recent opinion in Bagley v. Raymond School Department, 728 A.2d 127 (Me.1999), dealing with a similar situation. In resolving a similar Equal Protection Clause

challenge, the court stated:

> That state funds would flow directly into the coffers of religious schools in Maine were it not for the existing exclusion cannot be debated. If the religious school exclusion were eliminated, the State would likely pay more than $5,000 per student to Cheverus High School, without restriction on the use of those funds. In the entire history of the Supreme Court's struggle to interpret the Establishment Clause it has never concluded that such a direct, unrestricted financial subsidy to a religious school could escape the strictures of the Establishment Clause. While it may be possible for the legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not be easily tailored to include religious schools without addressing significant problems of entanglement or the advancement of religion.

Bagley, 728 A.2d at 147.

III. Free Exercise

Plaintiff-appellants argue that § 2951(2) violates the Free Exercise Clause of the First Amendment because it excludes funding of sectarian education solely on the basis of religion. However, we conclude that the Free Exercise Clause is not implicated here. See Sherbert v. Verner, 374 U.S. 398, 412, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the

government.").

Four points support our conclusion. First, at least some of the parents in this litigation eschew any religious motivation for wishing to attend St. Dominic's. For them, academic superiority, rather than the school's Roman Catholic affiliation, drives their enrollment decisions.

Second, no one plausibly reading the statute could come to any conclusion other than that § 2591(2) does not prevent attendance at a religious school. Nor does § 2591(2) prevent religious education of children in Maine. All it means is that the cost of religious education must be borne by the parents and not the state.

Third, Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), identifies the free exercise inquiry as asking "whether government has placed a substantial burden on the observation of a central belief or practice." (emphasis added). Factually speaking, education at a parochial school is not such a belief, for the Roman Catholic Church does not mandate it. See Catechism of the Catholic Church 537-38 (1994) (stating that parents' responsibilities for religious education for religious education takes place primarily in the home and that choosing a religious school is a right but not an absolute duty). To be sure, the Catholic Church requires some religious education, see id. at 538, but as stated above, § 2591(2) does not prevent such religious education. Indeed, it says nothing about it. Moreover, no parent makes the claim that attendance at a religious school is a central tenet or practice of their faith.

Fourth, the primary case cited by the parents, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S.

520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), is inapposite. In that case, the record showed a substantial animus against Santeria that motivated the law in question. See id. at 543, 113 S.Ct. 2217 (stating that the "record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."). No such showing has been made here.

As we mentioned earlier, even if this were a limit on free exercise, the state has justified the limit by its purpose of avoiding violation of the Establishment Clause.

IV. Due Process and Speech Clause Claims

Plaintiff-appellants argue that § 2951(2) violates the Due Process Clause of the Fourteenth Amendment and the Speech Clause of the First Amendment by preventing appellants from using their tuition allotments to expose their children to the educational message which best reflects their morals and values.

First, the parents argue that they have a fundamental right to direct the upbringing and education of their children based on substantive due process rights that arise from Supreme Court decisions. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). On that general proposition, we do not disagree. However, that fundamental right does not require the state to directly pay for a sectarian education. Here, the statute does not prevent the parents from doing what they wish; it only prevents the state from helping pay for their wishes. We reject this contention out of hand.

Second, on the free speech side, plaintiff-appellants

contend that § 2591(2) violates their rights because it denies parents the right to communicate and instruct their children in the areas of religion, morals and ethics which they cannot accomplish in non-sectarian schools. With little more than academic articles to bolster their view, we find this claim to be meritless as well.

CONCLUSION

The judgment of the district court is affirmed. Costs are imposed against appellants.

LEVIN H. CAMPBELL, Senior Circuit Judge, concurring.

I agree that plaintiffs have not shown that Maine's statute subsidizing attendance at non-sectarian private schools, in communities lacking public schools, is unconstitutional. But I see no need for this court to decide that a broader statute (i.e., one also subsidizing attendance at sectarian private schools) would violate the establishment clause of the First Amendment ("Congress shall make no law respecting an establishment of religion").

For the reasons stated by my colleagues, supra, I agree that the Maine statute, as presently written, does not violate the free exercise clause of the First Amendment nor principles of substantive due process.

My colleagues and I part company, however, in our analysis of plaintiffs' establishment clause and equal protection clause claims. The Maine tuition statute was narrowed in 1981 to exclude religiously-affiliated schools in response to a decision of the Maine Attorney General

concluding that the inclusion of religiously-affiliated schools in Maine's tuition program violated the establishment clause of the federal Constitution. See Bagley, et al. v. Raymond School Department, 728 A.2d 127 (Me.1999). Last month, the Maine Supreme Judicial Court upheld the continued constitutionality of the exclusion of sectarian schools, holding that to fund them would violate the establishment clause. My colleagues apparently believe, as did the Maine court, that since the Maine legislature excluded sectarian schools because of establishment clause concerns, the latter must be addressed by us: the Maine court, indeed, suggested that if allowing tuition benefits to the sectarian schools would not violate the establishment clause, then denying such benefits would violate the equal protection clause, as denial would not then withstand even the minimal, "rational basis," scrutiny under the Constitution's equal protection clause. [FN13] In such event, plaintiffs would have succeeded in demonstrating that the current statute is unconstitutional, being violative of the equal protection clause.

> FN13. The Maine Supreme Judicial Court actually believed that strict scrutiny was called for, religion being a fundamental right, but that even under a rational basis standard the exclusion of religious schools would violate equal protection (assuming no establishment clause bar) because of the irrationality of denying them tuition benefits if the legislature's sole apparent reason for denial was legally incorrect.

While I understand the above rationale, I think it goes further than necessary. I prefer not to render an opinion based on speculation as to the constitutionality of a statute different from the one under discussion. Contrary to what my colleagues seem to suggest, supra, ours is not a case that

involves the "imbroglio" of direct subsidies paid to sectarian schools. Rather, the Maine legislature, acting on the basis of an opinion issued by its Attorney General, has expressly excluded sectarian schools from the possibility of receiving subsidies. The question is whether the current statute is unconstitutional, not whether a more inclusive one would be.

Plaintiffs argue that various constitutional provisions, including, oddly, the establishment clause itself, are offended by denying tuition benefits to sectarian schools. But none of plaintiffs' theories of unconstitutionality work. The establishment clause certainly provides plaintiffs with no affirmative basis for requiring the funding of sectarian schools, for reasons well explained by the Maine Supreme Judicial Court in its recent decision, 728 A.2d at 134-35, and by my colleagues.

Because plaintiffs' attempt to use the establishment clause as a sword fails, and because the Maine statute does not, for the reasons stated by my colleagues, violate the free exercise clause, no fundamental right is implicated here for equal protection purposes. Thus, the proper level of scrutiny under the equal protection clause is the most deferential--rational basis review. See Johnson v. Robison, 415 U.S. 361, 375 n. 14, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (where Act did not violate appellee's right of free exercise of religion, court has no occasion to apply a standard of scrutiny stricter than rational basis test); see also Griffin High School v. Illinois High School Ass'n, 822 F.2d 671, 674 (7th Cir.1987).

In my view, plaintiffs' equal protection clause claim fails not because, as my colleagues conclude, the Maine Attorney General's opinion relied upon by the legislature was necessarily correct that including sectarian schools would or

might violate the establishment clause, hence was better left alone. Rather, the action of the Maine legislature need only be supported by a rational basis, not one that turns out to be correct on the merits. Rational basis review is "a paradigm of judicial restraint" ... and "[w]here there are 'plausible reasons' for [the action of the legislature], 'our inquiry is at an end.' " FCC v. Beach Communications, Inc., 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)(quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980)). See also Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 672, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) ("the Equal Protection Clause is satisfied if we conclude that the California Legislature rationally could have believed " that the measure promoted its objectives) (emphasis in original).

The Maine legislature rationally could have believed that including sectarian schools within its funding scheme would or might violate the establishment clause, hence was better left alone. Several opinions of the United States Supreme Court cited by my colleagues and by the Maine Supreme Judicial Court undoubtedly lend support to such a viewpoint. See, e.g., Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). These precedents are not conclusive, however, and many commentators interpret the more recent cases as indicating that the Supreme Court will uphold state tuition schemes that provide funding to sectarian as well as non-sectarian schools. The fact is that establishment clause jurisprudence as applied to this particular area is so unclear today that no court other than the Supreme Court can reliably resolve whether a statutory scheme like Maine's would violate the establishment clause were it to fund sectarian as well as non-sectarian schools. In spite of this uncertainty, however, the Maine

legislature's fear, based on its Attorney General's analysis, that including sectarian schools would violate the establishment clause was and remains entirely rational. While the odds were perhaps stronger in 1981 than they are today, existing case law still provides a reasonable basis for legislative refusal to extend tuition grants to sectarian schools. I see the Maine legislature, in 1981 and to this moment, as having rationally and prudently excluded sectarian schools because of a well-founded concern--whether or not ultimately correct--that to do otherwise will or may violate the establishment clause. The existence of that fear is rational enough, I think, to meet equal protection (and free exercise) requirements, however defined.

This is not to say that the Supreme Court may not someday decide that inclusion of sectarian schools in a scheme like this is permissible under the establishment clause. A strong argument can be made to that effect. Were the Supreme Court to so rule, plaintiffs might then be in a position to seek relief on free exercise or equal protection grounds, for under those circumstances the legislative basis for the exclusion of sectarian schools--the fear that the establishment clause bars their inclusion--will have been negated. But in today's climate, lacking further Supreme Court enlightenment, plaintiffs cannot demonstrate that the Maine statute violates any provision of the Constitution. Accordingly, I agree that we should affirm the judgment of the district court, but--like that court--I see no need whatever to reach out and decide the thorny establishment clause issue--an issue that, as my colleagues also recognize, can be meaningfully resolved only by the Supreme Court itself.

APPENDIX B

Elwood STROUT, et al., Plaintiff,
v.
COMMISSIONER, MAINE DEPARTMENT OF EDUCATION, Defendant.

No. Civ. 97-259-P-H.

United States District Court,
D. Maine.

Aug. 11, 1998.

Defendants' motion granted; plaintiffs' motion denied.

Stephen C. Whiting, Douglas, Denham, Rogers & Hood, Portland, ME, Vincent P. McCarthy, The American Center for Laws and Justice-Northeast Inc., New Milford, CT, for Plaintiff.

Peter J. Brann, Assistant Attorney General, Augusta, ME, for Defendant.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

HORNBY, Chief Judge.

Some school districts in Maine do not have public high schools. Instead, they have found it more cost effective to pay tuition for their resident students directly to public high schools in other districts or private schools. Maine statutes permit the procedure but allow such payments to be made only to nonsectarian schools. The issue in this case is whether such a limitation is constitutional. I conclude that it is.

Facts

Maine law provides for compulsory education for school-aged residents. 20- A M.R.S.A. § 5001-A. Towns and school districts in Maine that do not operate their own public high schools can meet their statutory responsibilities by paying tuition to other public high schools or state-approved private schools at the legal tuition rate. 20-A M.R.S.A. § 5204(4). Under state law, only nonsectarian schools are eligible for receipt of public funds for tuition purposes. 20-A M.R.S.A. § 2951(2).

Each of the plaintiffs lives in Minot. The town of Minot is one of three towns comprising School Union No. 29, and neither Minot nor School Union No. 29 operates its own secondary school. These parents accordingly have chosen to send their children to St. Dominic's Regional High School, a private, Catholic sectarian school. After unsuccessfully seeking reimbursement for tuition paid to St. Dominic's in the fall of 1996, Mr. and Mrs. Strout, along with the other plaintiffs, brought this lawsuit against the Maine Commissioner of Education asserting that 20-A M.R.S.A. § 2951(2) is unconstitutional. Both sides have moved for summary judgment and agree that there are no genuine issues of material fact.

Analysis

The general norm in Maine, as in most parts of the country, is for a school district to provide a secular high school education at a public high school financed, owned and operated by the school district. Such public high schools must be nonsectarian to comply with the Constitution if not with the electorate's preferences. If a state permits a school district to choose not to build and operate its own public high

school, can it achieve the same objective of providing a secular education by allowing subsidy payments only to nonsectarian schools--whether they be public high schools in another district or private nonsectarian schools--while at the same time denying subsidy payments to sectarian schools? By all logic, the answer is yes, and the plaintiffs have provided no authority to the contrary.

I am not called upon here to decide whether a state may make other choices-- for example, to make a payment to its students of high school age that they could then spend at any school they choose, whether sectarian or nonsectarian. The plaintiffs have provided caselaw that suggests the United States Supreme Court is not as restrictive as it once was in testing such programs against First Amendment restrictions. See, e.g., Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986). [FN1] Whether Maine might permit its school districts ultimately to choose to provide such options and whether the practice would be constitutional is a case for another day. I decide today only whether Maine is constitutionally required to extend subsidies to sectarian schools. I find no authority for such a requirement. Although the plaintiffs have phrased their arguments in terms of free exercise claims, establishment clause claims, equal protection claims and substantive due process claims, I find it unnecessary to address these separately or to analyze the various tests that have been enumerated. The same answer is obvious for all. [FN2]

FN1. The Wisconsin Supreme Court has recently upheld a school voucher program that can be used at

sectarian as well as nonsectarian schools. Jackson v. Benson, 218 Wis.2d 835, 578 N.W.2d 602, 620 (1998).

FN2. The state superior court has recently reached the same conclusion. See Bagley v. Maine Dep't of Education (Mills, J.), No. CV97-484 (Me.Super.Ct. Apr. 20, 1998).

The plaintiffs certainly are free to send their children to a sectarian school. That is a right protected by the Constitution. Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). The law is clear, however, that they do not have the right to require taxpayers to subsidize that choice. That is true in a district that builds and operates its own public high school, Brusca v. State Bd. of Education, 332 F.Supp. 275, 277 (E.D.Mo.1971), aff'd 405 U.S. 1050, 92 S.Ct. 1493, 31 L.Ed.2d 786 (1972); it is also true in a district that has no public high school. [FN3]

FN3. This is not a forum case like Rosenberger v. Rector, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and the analysis of that case does not apply.

The defendants' motion for summary judgment is GRANTED and the plaintiffs' motion for summary judgment is DENIED.

SO ORDERED. [FN4]

FN4. The plaintiffs challenge the determination of what is a "sectarian" school and assert that the Department applies the prohibition to only

"pervasively sectarian" schools, thereby creating excessive entanglement contrary to the First Amendment. On the summary judgment record, however, it is admitted that the Department accepts the self-identification provided by the schools and that there has never been a dispute over the issue. See Commissioner's Statement of Material Facts ¶ 23 (unopposed; see Local Rule 56). The entanglement issue is therefore specious.

APPENDIX C

20-A M.R.S.A. § 2951. Approval for tuition purposes

A private secondary school may be approved for the receipt of public funds for tuition purposes only if:

1. **Basic approval**. Meets the requirements for basic school approval under subchapter I;

2. **Nonsectarian.** Is a nonsectarian school in accordance with the First Amendment of the United States Constitution;

3. **Incorporated.** Is incorporated under the laws of the State of Maine or of the United States;

4. **Repealed.** Laws 1983, c. 859, § A, 8.

5. **Additional requirements.** Complies with the reporting and auditing requirements in sections 2952 and 2953 and the requirements adopted pursuant to section 2954;

6. **Student assessment.** Any school which enrolls 60% or more publicly-funded students, as determined by the previous year's October and April average enrollment, shall participate in the statewide assessment program to measure and evaluate the academic achievements of the students; and

7. **Release of student records.** Upon the request of a school unit, release copies of all student records for students transferring from the private school to the

school unit.

20-A M.R.S.A. § 5204(4) Secondary students right to attend school in another administrative unit

The following provisions govern the right of secondary students to attend school in another administrative unit other than the one in which they are resident.

* * *

4. **No secondary school.** Secondary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country upon permission of officials of the receiving school. The school administrative unit where the students' parents reside shall pay tuition in the amount up to the legal tuition rate as defined in chapter 219.*

* Section 5801 et seq. of this title.